IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 28 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ALKAPURI INVESTMENTS PVT.LTD.

Versus

COMMISSIONER OF INCOME-TAX

Appearance:
1. INCOME TAX REFERENCE No. 28 of 1989
MR BD KARIA for Petitioner No. 1
MR TANVISH U BHATT for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 04/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred for our opinion in

respect of assessment year 1977-78 :-

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming the levy of additional tax of Rs.18,907/- in terms of the order passed by the I.T.O. u/s. 104 of the Act ?"

2. The Income-tax Officer passed an under under Section 104 of the Income-tax Act, 1961 imposing an additional tax of Rs.18,907/- on the undistributed profits for the previous year relevant to the assessment year under consideration. The calculation of the levy is done in the following manner :-

Gross total income as per order		Rs. 60,180
Less : Tax payable		Rs. 22,366
Distributable income	Rs. 37,814	
Less : Dividend distributed within 12 months immediately following expiry of previous year		Rs. Nil
Shortfall		Rs. 37,814
Additional I.T. u/s. 104 @ 50% of shortfall		Rs. 18,907

The profits were distributed on 3.10.1977 meaning thereby beyond the period of 12 months from the date of expiry of the previous year ended 30.9.1976. It was submitted on behalf of the assessee that although the dividend was declared beyond the permissible period of 12 months, the delay way only of three days and due to sufficient cause and the Income-tax Officer was expected to adopt a sympathetic approach. The Income-tax Officer, however, rejected the said contention. The Commissioner (Appeals) also confirmed the order of the Income-tax Officer on the ground that no relaxation was provided by the statute and the provisions had to be applied strictly. The Tribunal also confirmed the said view. Hence, this reference at the instance of the assessee.

3. We have heard Mr BD Karia, learned counsel for the applicant-assessee and Mr Tanvish Bhatt, learned standing counsel for the revenue.

4. Our attention is invited to the decision dated

2.2.1999 of this Court in Income-tax Reference No. 151 of 1984 where an identical question was raised before this Court. There also, the dividend came to be declared on 3.10.1977 i.e. the delay was only of three days beyond the statutory period of 12 months. This Court held the time limit of 12 months for declaration of distributable profits as mandatory and explained the rationale in the following terms :-

"The Legislature in its wisdom has, rightly, provided sub-section (1) in section 104 in Finance Act, 1973 and there is a purpose and policy behind it. The underlying design and decideratum is evident and apparent. In many tax systems of advanced States in the world, there is regulation of accumulation of undistributed corporate profits, considered either unhealthy from certain economic points of view or as opening up avenues for evasion of higher personal tax liability. The policy of the section is to deter the corporate bodies of the type which fall within its ambit, from accumulating the undistributed profits beyond a certain limit. There is no dispute about the fact that the rates of taxes are different in case of individual and in case of corporate sector. The provision is, therefore, devised and evolved to see that in an appropriate case, additional income tax is levied on undistributed profits. No doubt, the conditions for attracting the rigours of the provisions of section 104(1) of the IT Act had to be established before exercising powers thereunder. The condition is that the Income Tax Officer must be satisfied that (i) in respect of any previous year (ii) the profits and gains distributed as dividends by a company (iii) within the 12 months immediately following the expiry of the relevant previous year (iv) were less than statutory percentage of its distributable income for the previous year.

If an Income Tax Officer, while making as assessment, is satisfied about the aforesaid tests and requirements, it is incumbent upon him to exercise the powers for levying additional income tax on undistributed profits under the provisions of section 104(1) of the IT Act. Therefore, when, once the ITO is satisfied that in respect of any previous year the profits and gains distributed as dividends by any closely

held company within the 12 months immediately following the expiry of that previous year were less than the statutory percentage of the distributable income of that previous year and that it would not be unreasonable to distribute a larger dividend than that declared, he has no option but to pass an order in terms of section 104(1) of the IT Act. The expressions "profits and gains" and "undistributable profits" have been extensively explored and very well expounded by catena of judicial pronouncements and, therefore, that would not detain us any longer."

5. Following the aforesaid decision, our answer to the question referred to us is in the affirmative i.e. in favour of the revenue and against the assessee.

6. The reference accordingly stands disposed of with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

sundar/-